
**UNITED STATES OF AMERICA
BEFORE THE SECRETARY OF COMMERCE**

**Foothill/Eastern Transportation Corridor Agency;
Board of Directors of the Foothill/Eastern Transportation Corridor Agency,**

Appellants,

v.

California Coastal Commission,

Respondent State Agency.

**RESPONDENT CALIFORNIA COASTAL COMMISSION'S
PRINCIPAL BRIEF ON APPEAL UNDER THE FEDERAL
COASTAL ZONE MANAGEMENT ACT.**

EDMUND G. BROWN JR.
Attorney General of the State of California
JANET GAARD
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOHN A. SAURENMAN
Supervising Deputy Attorney General
JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General
HAYLEY PETERSON
Deputy Attorney General

110 W. A Street, Suite 1100
San Diego, CA 92101
Telephone: (619) 645-2023
Facsimile: (619) 645-2012
E-mail: jamee.patterson@doj.ca.gov

Counsel for Respondent State Agency
California Coastal Commission

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INTRODUCTION

The Foothill/Eastern Transportation Corridor Agency (TCA), a public agency, seeks to construct a toll road through the heart of San Onofre State Beach (the Park), a park visited by millions of people each year. When California first acquired the Park from the United States, then-President Nixon noted the importance of providing an endowment of park and recreation lands and stated that, with the Park's acquisition, the growing legacy of parks and recreation facilities will benefit all Americans. Despite its national importance, the Park would be devastated by the proposed toll road. The toll road would have unacceptable and entirely avoidable adverse impacts on coastal resources, including environmentally sensitive habitat, wetlands, protected species, public views, water quality, archaeological resources, public access, public recreation, low cost campgrounds, and a world-class surf break. While the project purports to reduce traffic congestion, it would do so only on a local, perhaps regional, basis.

The California Coastal Commission, the state agency charged with California's coastal protection, objected to the proposed toll road. The Commission found it inconsistent with numerous enforceable policies in California's federally-approved coastal management program (CCMP) and found there are reasonable alternatives that would serve the same goals while avoiding or mitigating the significant adverse effects on coastal resources. TCA appealed and now asks the Secretary to override the Commission's objection.

The Secretary should deny TCA's appeal. The Commission's decision complied with the federal Coastal Zone Management Act (CZMA) and applicable regulations as well as with the CCMP. The toll road does not further the national interest in any significant or substantial manner and it is not necessary in the interests of national security. Its adverse coastal effects far outweigh its alleged contribution to the national interest and reasonable alternatives exist that would lessen or avoid those adverse effects.

Moreover, a Secretarial override will not enable TCA to proceed. As a public agency of the State of California, TCA must comply with the California Coastal Act and must obtain a coastal development permit for the portion of the road in the state's coastal zone. The Secretary should refuse to override the Commission's objection to the construction of a toll road through a state beach that is a crown jewel of California's state park system.

FACTUAL AND PROCEDURAL BACKGROUND

The Park comprises 3,000 acres in northern San Diego County, including three distinct areas: the bluffs, the beach and San Mateo Campground. When California acquired the bluffs portion of the Park, then-Governor Reagan stated that it was a "momentous and proud day" and that "one of the greatest legacies we can leave to future generations is the heritage of our land, but unless we can preserve and protect the unspoiled areas which God has given us, we will have nothing to leave them." TCA Appendix Volume 2, tab 6B (.pdf file CCC_SR_Objection_Feb13_2008_appB.pdf, at p. 10/162).^{1/} Then-President Nixon, whose administration made possible the acquisition of both the bluffs and the 2,400 acre inland portion of the Park, stated: "[W]e must leave a legacy that goes beyond good housing, vital industries and strong defense. We must also provide an endowment of park lands and recreational areas." TCA App. 2-6B (p. 11/162).

The California Department of Parks and Recreation (State Parks) leased the inland part of the Park from the United States in 1971. TCA App. 76-133, at 2 of Part I (p. 5/35). Although the lease reserved the right to the United States to grant a future easement, it specifically provided that "any such additional

1. The Commission uses the same citation format as TCA did in its brief, e.g., "[volume/binder #]-[tab#], at [page # if available]." However, because some tabs are not consecutively numbered, the Commission also includes the "pdf" pinpoint citation to the volume/tab of the electronic version of the record, e.g., page 10/162. Please refer to TCA's index which identifies the documents by binder, tab, date, document description and pdf file.

easement or right of way shall be located so as not to unreasonably interfere with the use of Lessee's improvements erected on the Leased Property." TCA App. 76-133, at 2 of Part II (p. 10/35).

Over 2.5 million people visit the Park each year, making it the sixth most visited of the 278 units of the State Park System. Commission's Appendix (CCC App., at 1.) The Park provides valuable and rare upland and wetland habitats, wilderness, coastal beaches, affordable camping, and nationally recognized historic and archaeological sites. TCA App. 2-6A (p. 31/107). The Park also includes Trestles Beach, the only surfing World Championship Tour stop in the continental United States. Id. (pp. 31-32/107.) The Cristianitos Subunit of the Park includes San Mateo Campground, a campground that hosted 105,427 overnight campers in 2004-2005. (CCC App., at 10.)

Despite the national and state importance of the Park, TCA proposes to build a sixteen mile toll road from southern Orange County to San Diego County that would pass through the heart of the Park. Over 27% of the Park would be lost to the construction of the road. TCA App. 2-6A (p. 31/107.) The natural processes of erosion and sediment flows that create the unique beach and surf at Trestles would be altered and blocked by the toll road in the watershed. Id. Construction of the multi-lane road within a few hundred feet of the secluded San Mateo Campground would so destroy the recreational value of the campground and sense of place as to render it valueless. (CCC App., at 8-9.) The impacts of the road would likely result in the abandonment of the Cristianitos Subunit, including the campground, as a state park. Id. at 7, 15. The precedent-setting loss of the Park would send "shock waves across the nation and threaten the very concept of perpetuity, central to the American park idea." TCA App. 2-6 B (p. 9/162).

TCA prepared and approved a subsequent environmental impact report (SEIR) for the toll road. TCA App. 20- 48, at ES1 (p. 16/247). In the SEIR, TCA stated that a coastal development permit from the Commission would be required and the requirements of the CZMA would be met. TCA App. 20-48,

at ES41 (p. 56/247); 22-50, at 4.15-3 (p. 379/483); see also 22-50, at Fig. 4.15-3 (p. 383/483). Despite TCA's initial acknowledgment that it needed a permit, TCA declined to submit a permit application. TCA App. 1-2, at 21 (p. 21/286). Instead, TCA submitted a consistency certification to the Commission for the toll road. TCA App. 13-31 (p.1/ 2). In the certification, TCA stated: "As required by 15 C.F.R. § 930.57(b), TCA certifies that the proposed portion of FTC-S within the California coastal zone boundary complies with the enforceable policies of California's approved management program and will be conducted in a manner consistent with such program." TCA App. 13-31B, at 1 (p. 4/104). TCA stated that the CZMA regulations and the policies of the Commission "apply to lands within the coastal zone boundaries and to activities conducted outside the coastal zone that may affect lands within the coastal zone. FTC-S includes activities in both categories." Id. (p. 4/104). The project elements within the coastal zone include highway improvements (connectors, realignments, widening of I-5, several sound walls, widening of I-5 bridges, a new public sidewalk and reconstruction of a sidewalk), water quality improvements, military improvements and habitat protection and restoration improvements. TCA App. 13-31B, at 8-10 (see fig. 3 on p. 9) (pp. 11-13/104).

Although TCA argues in its brief that the toll road has the unanimous recommendation of federal agencies (TCA Br., at 2), that is not the case. Indeed, in a comment letter in this appeal dated April 7, 2008, the Army Corps of Engineers (the Corps) advised NOAA that TCA's FEIR "misrepresents the Corps' position" regarding the project; the Corps made no assertion that other toll road alternatives were not practicable. Letter to Mr. Thomas Street, dated April 7, 2008, from Thomas H. Magnes, Corps, at 3. The letter also stated that TCA's assertions in its brief at page 17 regarding the federal planning process and reasonable alternatives "are false." Id. at 5. The Corps still needs to complete its public interest review and must determine the toll road "is the LEDPA (least environmentally damaging practicable alternative) and that it is not contrary to the public interest; if either is found to the contrary,

then the DA permit would be denied." Id. at 5, emphasis in original. The Environmental Protection Agency (EPA) stated that EPA concurred that the preferred alternative was the "preliminary LEDPA" but EPA observed that additional review would occur. TCA App. 72-99, at 1 (p. 1/ 2). The Fish and Wildlife Service (FWS) made only a preliminary determination regarding the toll road; it has yet to issue a final opinion. TCA App. 72_73-102, at 1 (pp. 1-3/3). By TCA's own admission, as of January 10, 2008, TCA's federal permit applications were "still pending." TCA App. 8-19, at 1 (p. 1/27).

The Commission received voluminous correspondence on this project. TCA App. 2-6A to 6F (pp. 1-107/107; 1-162/162; 1-126/126; 1-20/20; 1-55/55. The Commission received a report prepared by Smart Mobility, Inc., which analyzed alternatives to the toll road and concluded that alternatives rejected by TCA were both feasible and cost competitive. TCA App. 2-6F, at iii (p. 4/115).^{2/} The Commission also received a copy of a letter from the Regional Water Quality Control Board (RWQCB) advising TCA that its application for a water quality certificate remained denied because TCA had failed to submit information requested in January 2007. (CCC App., at 22.) The RWQCB noted a number of inconsistencies between the SEIR and proposed plans. Id.

On February 6, 2008, the Commission held a public hearing on this matter. TCA App. 3-7 and 8 (pp.1-210/210 and 1-215/215). After 13 hours of testimony, the Commission voted to object to the consistency certification. TCA App. 3-8, at 410 (p. 214/215). TCA then filed this appeal.

APPLICABLE LAW

TCA appeals under the consistency provisions of the CZMA. 16 U.S.C. § 1451-1465. The CZMA created a joint federal-state partnership. Through the CZMA, the federal government encourages

2. After receiving this report, EPA wrote to the FHA and advised that the alternatives in the report should be further analyzed in the environmental impact statement that the FHA has not yet finalized. (CCC App., at 20-21.) This letter was provided to the Commission at its public hearing.

and assists states in preparing and implementing management programs to preserve, protect and whenever possible restore their coastal resources. Pub. L. No. 92-583, 1972 U.S.C.C.A.N., vol. 3, at 4776.

In 1976 California enacted the California Coastal Act (Cal. Pub. Res. Code §§ 30000-30900) which California submitted as its coastal management program to NOAA, along with applicable regulations and other laws not relevant here. TCA App. 4-9 (p. 3/502). On November 7, 1977, NOAA approved the CCMP. TCA App. 4-9 (p. 1/502). Pursuant to the CCMP, the Commission is the state agency charged with CZMA authority. Cal. Pub. Res. Code § 30330.

ARGUMENT

I.

THE SECRETARY CANNOT PROVIDE TCA WITH EFFECTIVE RELIEF.

In addition to the merits of the appeal, the Secretary requested the parties address two questions: whether a dispute between two components of the same state properly forms the basis for an appeal and what state-level mechanisms exist to resolve such a dispute. The Commission submits that this dispute does not form a proper basis for an appeal because, even if the Secretary were to override the Commission's objection, the override would not provide TCA with effective relief.

As explained in detail below, part of the toll road would be located in the state coastal zone. Under the Coastal Act, a coastal development permit is required for any person, including a public agency such as TCA, to perform development in the coastal zone. Cal. Pub. Res. Code §§ 30118, 30600. The Coastal Act also requires public agencies carrying out activities outside the coastal zone to consider the effect of those activities on coastal zone resources. Cal. Pub. Res. Code § 30200(b). The Coastal Act requires public agencies such as TCA to comply with the provisions of the Act. Cal. Pub. Res. Code § 30003 (all public agencies shall comply with the provisions of this division). Thus, even if the Secretary were to authorize federal agency approval of the toll road, TCA could not proceed until the Commission issues TCA a permit.

Moreover, TCA has failed to timely challenge the Commission's objection on the merits.^{3/} Cal. Pub. Res. Code § 30801 (sixty day statute of limitations to challenge a Commission decision). An unchallenged Commission decision becomes administrative res judicata and binding on the parties. Ojavan Investment Inc. v. California Coastal Commission, 26 Cal.App.4th 516 (1994). Because TCA has failed to timely challenge the Commission's decision concluding that the toll road is inconsistent with Coastal Act policies and because those policies would be the standard for review of a permit, TCA will be bound by that conclusion in any future permit proceeding. Cal. Pub. Res. Code § 30604(a).

TCA relies on Acme Fill Corp. v. San Francisco Bay Conservation & Development Commission (BCDC), 187 Cal.App.3d 1056 (1986) to assert that it must first pursue a Secretarial appeal before challenging an agency's consistency objection in state court. Its reliance is misplaced. First, the discussion in Acme Fill is largely dicta as the Court went on to decide the merits of the case despite its view that a Secretarial appeal was necessary for exhaustion purposes. Second, Acme Fill involved a different factual situation. BCDC lacked permit authority over the development at issue in Acme Fill so the only review authority BCDC had was its consistency review. Id. at 1065-66. While acknowledging that an appeal to the Secretary does not review the legal merits of the state's action, the Court stated that Acme had to first exhaust administrative remedies because Acme could obtain the same relief from either the Secretary or the courts. Here, that is not the case because the Secretary will not be considering whether the toll road is consistent with the Coastal Act, which is determinative of whether TCA can obtain a coastal permit for the project. Therefore, TCA could not obtain the same relief from the Secretary that it could obtain in state court. Unlike the present case, Acme Fill involved no issue of res judicata or collateral estoppel in a subsequent permit proceeding. Moreover, the case has not been followed by other courts on this point. See In the Matter of Stoeco Development, Ltd., 262 N.J.Super.

3. The Commission is unaware of any judicial challenge to its decision. But if one were filed, TCA would have a state level mechanism for resolving this dispute through pursuing such challenge.

321, 335-336 (1993). Where, as here, a permit is required for the activity to proceed, a Secretarial override will not allow TCA to proceed with the proposed toll road and effective relief cannot be granted.

II.

THE COMMISSION HAS JURISDICTION AND PROPERLY EXERCISED IT.

In the SEIR and consistency certification, TCA acknowledged that a permit from the Commission would be required and that TCA would meet the requirements of the CZMA. TCA App. 20-48, at ES41 (p. 56/247); 22-50, at 4.15-3 (p. 379/483), Figure 4.15-3 (p. 383/483); 13-31B, at 1 (p. 4/104), 8-10 (pp. 11-13/104). TCA now takes contrary positions, asserting that the toll road is not under the Commission's jurisdiction for either permit or consistency review purposes. These positions are incorrect.

A. The Commission Has Permit Jurisdiction Over The Toll Road Because A Portion Of The Toll Road Is In The California Coastal Zone.

1. The Coastal Act Definition Of The Coastal Zone Includes Federal Lands.

The Coastal Act definition of California's coastal zone includes federal lands. Cal. Pub. Res. Code § 30103. TCA mistakenly argues that the definition of coastal zone does not include federal lands because it is limited to the land and water area "of the State of California." TCA Brief, at 15 n.8. TCA ignores the fact that the State's boundary was defined by law in the State's 1849 Constitution as the perimeter of the state. Cal. Const. art. IV (1849) (currently codified at art. III, § 2 (2008)). (CCC App., at 33.) The "land and water area of the State" includes all land within it, whether owned by the federal government, private parties or other public agencies.

The California Legislature has recognized that, *for purposes of the CZMA*, certain lands are excluded from the CZMA definition of coastal zone:

This division shall constitute California's coastal zone management program within the coastal zone for purposes of the Federal Coastal Zone Management Act of 1972 (16 U.S.C. 1451 et seq.) and any other federal act heretofore or hereafter enacted or amended that relates to the planning or management of coastal zone resources; provided, however that within federal lands excluded from the coastal zone pursuant to the Federal

Coastal Zone Management Act of 1972, the State of California shall, consistent with applicable federal and state laws, continue to exercise the full range of powers, rights and privileges it now possesses or which may be granted.

Cal. Pub. Res. Code, § 30008. Section 30008 is consistent with the CZMA regulation that provides that in "excluding Federal lands from a State's coastal zone *for purposes of this Act*, a State does not impair any rights or authorities it may have over Federal lands that exist separate from this program." 15 C.F.R. § 923.33(b) (emphasis added).

The California Legislature distinguished between federal lands excluded from the CZMA definition of the coastal zone and the Coastal Act definition of the coastal zone. The Legislature did not exclude federal lands from the Coastal Act definition of the coastal zone. Cal. Pub. Res. Code § 30103. Thus, federal lands, including the proposed location of the toll road, are within the coastal zone as defined under the Coastal Act and the permit requirements of the Coastal Act apply to non-federal development on those lands. Cal. Pub. Res. Code § 30600.

Even if the toll road were located on federal lands excluded from the coastal zone under the CZMA, the Commission would have permit jurisdiction over non-federal development on those lands. California Coastal Commission v. Granite Rock Co., 480 U.S. 572, 594 (1987) In Granite Rock, the Supreme Court upheld the Commission's ability to require a permit for the mining activities on federal land even if the federal land was excluded from the coastal zone pursuant to the CZMA.

The Commission's assertion of permit jurisdiction here is not novel. The Commission has issued 84 permits for non-federal activities on Camp Pendleton. TCA App. 1-2, at 21 n.3 (p. 21/286), 273 (p. 273/286). The Commission issued a permit to Southern California Edison for the construction of the San Onofre Nuclear Generating Station on an easement granted by the Department of the Navy for property on Camp Pendleton just south of the proposed toll road. TCA App. 1-3N, Ex. 14 (p. 18/18); see, Carstens v. California Coastal Commission, 182 Cal.App.3d 277, 282 (1986) (upholding Commission's approval

of an amendment to the permit restricting public access based on nuclear safety concerns in exchange for payment of \$3 million to construct 200 public campsites and a trail to the beach at the Park and conveyance of two parcels of land in Carlsbad to California).

2. The Toll Road Is Not Located On Federal Lands Excluded Under The CZMA.

The CZMA definition of coastal zone excludes "lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal Government, its officers or agents." 16 U.S.C. § 1453(1). The use of the land on which the toll road would be constructed is not by law subject solely to the discretion of or held in trust by the federal government.

First, the United States has retroceded jurisdiction over this land to California. The first retrocession occurred in 1973 for the Park (all 2,945 acres) and the second in 1974 for Interstate 5. TCA App. 1-4L (pp. 10-29/54). Thus, TCA is mistaken in contending that all of Camp Pendleton is a federal enclave and the State ceded all jurisdiction to the federal government. Whatever jurisdiction was ceded has been retroceded.

Further, other state agencies have discretionary jurisdiction over the portion of the toll road on Camp Pendleton within the coastal zone. State Parks has the authority to establish rules, control uses and enforce the law within the Park. State Parks adopted a general plan for the Park that provides for land uses, regulatory control, and law enforcement in the Park. TCA App. 76-132, at 20, 31, 63-64 (pp. 25, 36, 68-69/106). In the SEIR, TCA acknowledged the following state agencies with jurisdiction over the project: Department of Fish and Game (1602 Agreement and 2081 take permit); Transportation Commission (route adoption); Caltrans (approval of design etc.); State Office of Historic Preservation (concurrence in NHPA). TCA App. 20-48, p. ES41 (p. 56/247). Additionally, the RWQCB has jurisdiction over the toll road but it has not yet acted on the matter. (CCC App., at 22-32.)

TCA itself exercises discretion over the use of the land for which it acquired an easement from the federal government. As the lead agency, TCA performed environmental review and prepared a SEIR

pursuant to the California Environmental Quality Act (CEQA; Cal. Pub. Res. Code § 21000 et seq.). TCA App. 20-48, at ES1 (p. 16/247). CEQA only applies to discretionary projects. Cal. Pub. Res. Code § 21080(a). A project is discretionary if it requires judgment or deliberation by the public agency approving it. Cal. Code Regs. tit. 14, § 15357. Given that multiple state agencies exercise discretion over the land, the land is not subject solely to the discretion of the federal government and therefore is not federal land excluded from the coastal zone under the CZMA definition.^{4/}

Thus, the toll road is located in the coastal zone under either the state definition or the CZMA definition and the Commission has permit jurisdiction over the road in the coastal zone.

B. The Commission Has Consistency Jurisdiction Over Activities Outside the Coastal Zone.

TCA contends the Commission cannot review projects inland of the coastal zone because the CCMP does not specify “the geographic location in which such authority would be exercised.” TCA Br., at 14. TCA is mistaken. NOAA approved the CCMP under the CZMA regulations in effect in 1977. American Petroleum Institute v. Knecht, 456 F. Supp. 889, 893-894, 916, aff’d, 609 F.2d 1306 (9th Cir. 1978). Those regulations did not include any requirement that geographic locations be specified for listed activities to be reviewed. The requirement that a coastal state generally describe the geographic location of listed activities was not included in the CZMA regulations until the following year. 43 Fed. Reg. 10510 (effective date April 15, 1978); (CCC App., at 46-49.) After approving the CCMP, NOAA could not require the Commission to amend it to comport with subsequently adopted regulations. State of

4. The legislation regarding the transfer of the easement by the Navy to TCA supports the Commission’s position. In 1999, Congress authorized the Secretary of the Navy to convey an easement to TCA to construct, operate and maintain a restricted access highway. Pub. Law 105-261, § 2851 (1999) (CCC App., at 34). In late 2001, Congress passed amending legislation purporting to limit State authority over the toll road by adding “notwithstanding any provision of State law to the contrary” after the word “maintain.” Pub. Law 107-107, § 2867 (2001) (CCC App., at 39). But, earlier this year, Congress deleted the language added in 2001. Pub. Law 110-181, § 2841 (2008) (CCC App., at 43). Congresswoman Susan Davis introduced the 2008 legislation and explained that the amendment requires the toll road to follow state environmental laws. (CCC App., at 44.) The 2008 legislation erased any doubt about TCA’s obligation to comply with California law.

California v. Mack, 693 F.Supp. 821 (1988) (NOAA lacks authority to revisit the contents of an approved coastal management program). Thus, regardless of what the current regulations require, the Commission may review federally licensed and permitted activities listed in the CCMP even though the CCMP does not generally describe the geographic location of those activities. Additionally, the CZMA regulations expressly provide that states do not need to include a geographic description of federal lands that are within the boundaries of a state's coastal zone. 15 C.F.R. § 930.53(a)(1).

C. The CCMP Authorizes The Commission To Review Activities Inland Of The Coastal Zone.

TCA contends that the Commission lacks authority to exercise consistency review for the inland portion of the toll road because the Commission's jurisdiction is limited to inland mapped areas. This is incorrect. Section 30330 of the Coastal Act provides that the Commission may exercise any and all powers set forth in the CZMA. Cal. Pub. Res. Code § 30330. The CZMA, in turn, authorizes the Commission to review federally licensed or permitted activities "in or outside of the coastal zone, affecting any land or water use or natural resource of the coastal zone" for consistency with the enforceable policies of the CCMP. 16 U.S.C. § 1456(c)(3)(A); accord State of California v. Norton, 311 F.3d 1162 (9th Cir. 2002) (Commission has authority to review federal activity outside the coastal zone for consistency with the CCMP). As the state agency charged with implementing the CZMA (Cal. Pub. Res. Code § 30330), the Commission is authorized by both the Coastal Act and the CZMA to review the toll road for consistency with the CCMP.

TCA's reliance on Sierra Club v. California Coastal Commission, 35 Cal.4th 839 (2005) is misplaced. That case involved the question of whether the Commission could assert permit jurisdiction over portions of a development located outside the coastal zone, not whether the Commission could assert consistency review authority over activities outside the coastal zone. The Commission's permit authority is based on a different statutory provision (Cal. Pub. Res. Code § 30604) than its authority to conduct

consistency review (Cal. Pub. Res. Code § 30330). The case is inapposite here.

D. The Commission Properly Based Its Objection In Part On TCA's Failure To Submit Sufficient Information.

TCA contends that the CZMA regulations preclude the Commission from objecting based on insufficient information. TCA Br., at 17-18. TCA misreads 15 C.F.R. § 930.60. That section applies to the filing requirements for a consistency certification. It provides that if an applicant has submitted all necessary data and information required by section 930.58 to file the certification, then the state agency's assertion that the submitted information is substantively deficient or its request for clarification of the information or information in addition to that required by section 930.58 does not extend the date of commencement of state review. *Id.* It has nothing to do with the Commission's review on the merits of the project. Indeed, the regulation states that the state agency's determination that a certification and necessary data and information are complete under this section "is not a substantive review of the adequacy of the information received." 15 C.F.R. § 930.60(c). The regulation regarding a state agency objection expressly provides that a state may object where the applicant has failed to provide the information required pursuant to section 930.58 "or other information necessary for the State agency to determine consistency." 15 C.F.R. § 930.63(c).

TCA never addresses the merits of the Commission's objection based on insufficient information. TCA simply raises its perceived procedural defect.^{5/} TCA is wrong about the procedural basis for the Commission's objection. The Commission properly objected based on insufficient information regarding project impacts on wetlands, water quality, archaeology and greenhouse gas (GHG) emissions.

5. The Secretary may only override a state agency objection where the Secretary finds the activity is consistent with the objectives of the CZMA or is otherwise necessary in the interest of national security. 16 U.S.C. § 1456 (c)(3)(A). An override for any other reason, including procedural or jurisdictional grounds, is not authorized by the enabling statutes of the CZMA. Thus, TCA's perceived procedural and jurisdictional defects do not provide a basis for a Secretarial override.

III.

TCA HAS FAILED TO MEET THE CRITERIA FOR AN OVERRIDE UNDER GROUND I.

Invoking Ground I of the Secretarial review process, TCA claims that the Secretary must override the Commission's objection because the toll road is consistent with the objectives of the CZMA. In making this assertion, TCA does not address the standards that the Secretary applies in reviewing an objection pursuant to this ground.

In order for the Secretary to override a consistency objection pursuant to Ground I, he must find that the project satisfies each of the following elements:

- (1) The activity furthers the national interest as articulated in § 302 (Congressional findings) or § 302 (Congressional Declaration of Policy) of the CZMA in a significant or substantial manner;
- (2) The national interest furthered by the activity outweighs the activity's adverse coastal effects, when those effects are considered separately or cumulatively; and
- (3) There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the state coastal management program.

Decision and Findings by the U.S. Secretary of Commerce in the Consistency Appeal of Islander East Pipeline Co. (March 5, 2004), at 3 (Islander East).

TCA's toll road does not satisfy any of the elements for an override under Ground I.

A. Element 1: The Toll Road Does Not Further The National Interest In A Significant Or Substantial Manner.

Effective 2001, NOAA amended the regulatory language of Element 1. The amendment focuses on those appeals involving "activities of national import." (Islander East, at 3 n.12.) In its interpretive guidance accompanying the final rule, NOAA emphasized that secretarial review was not intended to replace the state's decision with that of the Secretary for projects involving essentially local land use decisions. 65 Fed. Reg. 77150. NOAA also noted that its goal in the amendment was to force an

appellant to establish that its activity went beyond simply being related to one of the categories of objectives in the CZMA; the activity “must contribute to the national achievement of those objectives in an important way or to a degree that has value or impact on a national scale.” Id. NOAA identified three factors that the parties should address for this analysis: (1) the degree to which the activity furthers the national interest; (2) the nature or importance of the national interest furthered as articulated in the CZMA; and (3) the extent to which the activity is coastal dependent. Id.

1. The Toll Road Is Not Coastal Dependent.

Because the toll road is so clearly *not* coastal dependent, the Commission addresses this factor first. In Islander East, the Secretary discussed what makes a project coastal dependent. The Secretary concluded that the primary question is whether the activity must be located in or near the coastal zone to achieve the primary goal of the project. Islander East, at 9. The Secretary concluded that the pipeline at issue in Islander East was coastal dependent because it could reach Long Island only by transiting coastal waters. Id.

TCA describes the primary purpose of the toll road as reducing congestion on Interstate 5 in southern Orange County. TCA Br., at 1. TCA nowhere asserts in its brief that this road must be located in the coastal zone. This alone would be enough to reject the appeal, but the record contains further statements. Immediately after the Commission voted to object to the toll road, the Los Angeles Times reported that Lance MacLean, TCA’s board chairman, admitted that TCA board would consider moving the toll road route to a location “outside the jurisdiction of the Coastal Commission.” (CCC App., at 51.) This comment reflects the fact that the primary objective of the road can be achieved without locating it in the coastal zone.

In addition, TCA and the Commission analyzed several alternatives that are not located in the coastal zone, but still would accomplish the project’s primary goal of reducing congestion. Indeed, TCA itself acknowledged these non-coastal zone alternatives would meet the project purpose and need. TCA

App. 1-2, at 113 (p. 113/286).

TCA has referred to the Secretary's 1985 Southern Pacific Transportation Company decision (Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Company, September 24, 1985 (Southern Pacific)), but the decision does not help TCA. In Southern Pacific, the railroad proposed to rebuild a bridge that spanned the mouth of the Santa Ynez River in Vandenberg Air Force Base. The bridge was originally constructed in 1896 and thereafter was periodically modified and repaired. Id. at 3. In this context, the Secretary noted that the CZMA encourages coastal states to provide orderly processes for the siting of major transportation activities that are coastal dependent. Id. at 4. The bridge at issue in Southern Pacific had been located in the coastal zone for nearly 100 years, and thus its reconstruction was coastal dependent by virtue of its location. Southern Pacific could not have achieved the primary goal of its project at a location outside the coastal zone. Here, TCA can achieve its primary goal without locating its project in or near the coastal zone, and therefore, the toll road is not coastal dependent.

2. The Toll Road Does Not Further the National Interest In A Substantial Or Significant Manner.

The regulations place the burden on TCA to establish that the toll road is of such "import to the national goals for coastal resource management that . . . the Secretary of Commerce should independently review the proposed activity to determine its consistency with the CZMA." 65 Fed. Reg. 77150. To meet this burden, TCA must show that the toll road contributes to the achievement of CZMA objectives in an important way. It is not enough for TCA to show that the toll road simply relates to some of those objectives. Id. TCA has failed to meet its burden.

a. The Toll Road Does Not Substantially Further The Objective Of Development In The Coastal Zone.

TCA asserts that the toll road significantly and substantially furthers the national interest in development of the coastal zone. However, in making its argument, TCA never addresses the issue of

the development that would occur in the coastal zone. TCA Br., at 20-21. The Commission acknowledges that TCA's preferred alternative involves some limited development in the coastal zone, including some highway improvements (connectors, realignments, widening of I-5, several sound walls, widening of I-5 bridges, a new public sidewalk and reconstruction of a sidewalk), detention basins for water runoff from the I-5, several developments to Camp Pendleton, and habitat protection and restoration activities. TCA App. 13-31B, at 8, 10 (p. 11, 13/104). But these developments do not further the national interest in a substantial manner. Rather they are either essentially local land use matters or are activities that TCA was required to undertake to obtain the lease for the right-of-way from the Marine Corps.

In Islander East, the Secretary addressed a project whose development in the coastal zone furthered the national interest in a substantial manner. The Secretary explained the Islander East pipeline was of national importance because of its interstate nature and the large metropolitan areas it was to serve. Islander East, at 7.^{6/}

TCA's toll road project does not reach a level of national significance. Thus, the toll road project is not an interstate project. Rather it is a local project designed to have local effects. Even TCA emphasizes the project's impact on the movement of traffic in southern Orange County. TCA Br., at 21. Thus, this is not a project of national importance.

TCA also asserts that the toll road is essential to the national interest in the economic development of the coastal zone. TCA Br., at 21. However, the toll road is not designed to further economic development *in* the coastal zone. Instead, TCA's objective is to provide an alternative access route between "south Orange County and central and northeastern Orange County to serve existing and developing employment centers and major attractions." TCA App. 20-48, at ES23 (p. 38/247). TCA

6. In Islander East, the Secretary also emphasized that the proposed pipeline would develop the nation's interstate energy infrastructure and provide natural gas to markets in Connecticut, Long Island and New York City. Islander East, at 7 n.28, 29.

does not identify any existing or developing employment centers or major attractions in the coastal zone that the toll road would benefit.

The only conclusion that can be reached here is that the proposed toll road is intended to relieve local or regional traffic congestion and does not have any meaningful national importance.^{7/}

b. The Toll Road Does Not Substantially Further the National Interest In The Orderly Siting Of Coastal Dependent Transportation Facilities.

TCA next claims that the toll road substantially furthers the national interest in the orderly siting of transportation facilities. TCA Br., at 21-22. It even cites to Southern Pacific where the Secretary noted that this goal of the CZMA relates to the siting of “coastal dependent” transportation facilities. Id. at 21. However, as the Commission discussed supra, TCA has never established that the toll road is coastal dependent. In fact, the toll road could accomplish its primary objective without being located in or near the coastal zone. Therefore, the toll road does not further in any way the national interest in the orderly siting of coastal dependent transportation facilities.

c. The Toll Road Does Not Substantially Further The National Interest In Providing Public Access To The Coast For Recreational Purposes.

TCA next claims the toll road furthers public access to the coast for recreational purposes. TCA Br., at 22-23. TCA claims that construction of the toll road would enhance public access to beaches ranging from Crystal Cove State Beach in Orange County to San Diego beaches in the south. TCA Br., at 22. To support its claim, TCA cites a document it prepared in which it makes the same claim without substantiation. TCA bears the burden of showing that its project would contribute to the national interest in a substantial manner. TCA cannot meet this burden with regard to its public access claims because it did not demonstrate any quantifiable net increase in public access to Orange County and San Diego

7. TCA claims that the toll road would benefit 21 million residents of Southern California. TCA Br., at 20. However, the only evidence that TCA cites to support this supposed benefit is its own statement in its report responding to the Commission staff report. TCA App. 8-20(A), at 2-3 (p. 3-4/25).

County beaches and recreation areas. Without some measure of this supposed benefit, there is no way to determine whether the toll road in fact would contribute to the national interest in access in any way.^{8/}

Nor does TCA address that its project would adversely affect public access to the coast. State Parks has stated that if the toll road is constructed as proposed, it would have to abandon all of the Cristianitos Subunit of the Park to the Navy “due to the loss of values which made it of park quality.” TCA App. 1-2, at 144 (p. 144/286). That means that the San Mateo Campground, which provides about 50% of the campsites in the Park and about 13% of the campsites for all of coastal Orange and San Diego Counties, would be lost. The public heavily uses San Mateo Campground as a means of accessing the beach, ocean and surf breaks in the Park. TCA App. 1-2, at 135-136, 144 (p. 135-136, 144/286).

TCA also touts its offer to provide \$100 million to State Parks for projects to improve public access to coastal recreational areas. TCA Br., at 23. There are several difficulties with this argument. First, as noted above, State Parks says it would abandon the Cristianitos Subunit of the Park if the toll road is constructed as proposed, and TCA has not shown how this loss of a public park area would be replaced.^{9/} Second, State Parks has not accepted the money. Third, TCA’s decision to offer this money appears to be an attempt to mitigate the toll road’s adverse impacts on the Park. Attempting to mitigate an adverse impact of a project does not constitute a substantial contribution to the national interest.

Indeed, TCA may be violating state law in its appropriation of a portion of the Park for a toll road. The California Public Park Preservation Act (Cal. Pub. Res. Code § 5400 et seq.) specifies that no public

8. The Commission pointed out that TCA provided no evidence that significant numbers of recreational travelers, as opposed to commuters, would be willing to pay tolls to reduce travel time. And the Commission noted that while weekend traffic on I-5 is heavy, weekend traffic on existing toll roads is low. TCA App. 1-2, at 270 (p. 270/286).

9. TCA suggests that State Parks could use a portion of this \$100 million for renewal of the lease for the Park. In making this point, TCA neglects to mention that the State paid only \$1 for the current 50 year lease of the property (TCA App. 1-2, at 148 (p. 148/286)) and that State Parks has long had an understanding with the Marine Corps that the military would extend the lease on similar terms (TCA App. 2-6B (p. 8/162)).

entity shall acquire (by purchase, exchange, condemnation or otherwise) for a non-park purpose any property that is in use as a public park at the time of acquisition unless the acquiring entity provides sufficient compensation or land. Id. § 5401. The measure of sufficient compensation is either the cost of acquiring or the actual provision of a substitute park of comparable characteristics and size in an area that would serve generally the same group of persons who used the existing park land and facilities. Id. § 5405. TCA has not specified how it would comply with the Public Park Preservation Act. Nor can TCA comply with the Act because there is no evidence that substitute property is available. TCA App. 1-2, at 147 (p. 147/286).

Instead of providing evidence to substantiate its claim, TCA attempts to rely on Commission findings involving the North County Transit District (NCTD) project in Camp Pendleton. TCA Br., at 22-23. There the Commission concurred with the NCTD's consistency certification for its addition of 2.7 miles of a second railroad track within an existing railroad right-of-way within Camp Pendleton. The NCTD project is fundamentally different from the toll road for several reasons. First, the NCTD project had minor adverse impacts in general and *none on coastal zone recreation*. Second, the NCTD project would enhance mass transit by making train travel more attractive, thereby reducing vehicle miles traveled and cars on the road. TCA App. 5-12, Att. 4, at 8-14 (pp. 153-159/248). TCA cannot establish a substantial contribution to the national interest by comparing its project to a wholly different type of project.

3. The Toll Road Does Not Further Any Significant National Interest.

a. The Toll Road Does Not Serve Any Significant National Interest In Public Safety.

TCA asserts that construction of the toll road serves the national interest in public safety. TCA claims that the toll road would provide an alternative evacuation route in the event of catastrophe at the San Onofre Nuclear Generating Station (SONGS) and for residents fleeing wildfires. TCA Br., at 28-29.

As an initial matter, TCA does not identify any CZMA policy that is concerned with evacuation routes. Section 303(2)(B) does not apply because it provides for the management of coastal development to minimize the loss of life and property caused by improper development in coastal areas. 16 U.S.C. § 1452(2)(B). Section 303(3) calls for the preparation of special area management plans that would provide for, in part, improved protection of life and property in hazardous areas including areas likely to experience land subsidence, sea level rise or fluctuating water levels in the Great Lakes. 16 U.S.C. § 1452(3). Again, this provision does not concern evacuation routes.

Even assuming that emergency evacuation from a disaster at SONGS or from wildfires serves a CZMA policy, TCA still has failed to meet its burden to show a national interest in public safety. As the Commission found, TCA never quantified the toll road's purported public safety benefits and never established that existing evacuation plans were inadequate. TCA App. 1-2, at 270 (p. 270/286). The Commission staff consulted with Southern California Edison Company (the operator of SONGS), the Marine Corps and the Governor's Office of Emergency Services about existing evacuation plans and they all reported that existing evacuation plans were adequate and were tested annually. Southern California Edison noted that SONGS could not operate if it did not have adequate emergency response plans. *Id.* Moreover, evidence in the record shows that adding roads to the highway system actually contributes to wildfires because roads provide many sources to ignite fires, and historically, fire sources have been tied to roads. TCA App. 2-5(D) (p. 52/61).

Given that current emergency response plans exist and that TCA has failed to quantify this purported benefit, there is no evidence the road would provide any additional public safety benefits or that those alleged benefits would overcome the toll road's contribution to additional wildfires.¹⁰

10. TCA's citations to its appendix in support of this claim are, for the most part, to one paragraph which asserts benefits without substantiation. E.g., TCA App. 20_21-49, at 2-15 (p. 69/674); 20-48, at ES14, ES102, ES103 (pp. 29, 118, 119/247). As for SONGS emergency evacuation, TCA stated that it "defies common sense" to believe that SONGS has an effective emergency response plan.

b. The Toll Road Does Not Provide Water Quality Benefits.

TCA contends that its project furthers the CZMA's goal of enhancing and protecting the quality of coastal waters because it would create a system for treating runoff from several miles of I-5. TCA claims that the runoff from this part of I-5 which flows into San Onofre and San Mateo Creeks presently degrades coastal waters. TCA Br., at 23-24. TCA has a solution in search of a problem.

The Commission pointed out that it could not evaluate TCA's claimed water quality benefits because no baseline study for this area existed. TCA App. 1-2, at 210 (p. 210/286). Nowhere in its brief does TCA address this lack of information.^{11/}

Similarly, TCA does not address the RWQCB comments. The RWQCB informed the Commission that the available data did not show that there was an existing water quality impairment in the lower portions of San Onofre Creek or San Mateo Creek. Nor has the RWQCB proposed to list the lower waters of either creek as impaired. Finally, the RWQCB confirmed the Commission's finding that there was a lack of data that would allow it to quantify the claimed benefits of TCA's proposed water quality plans. Id. at 218 (p. 218/286).

Nor does TCA address the current status of its attempt to obtain a Clean Water Act permit from the RWQCB. On February 6, 2008, the RWQCB denied TCA's application for a permit because of TCA's continuing failure to provide necessary information. (CCC App., at 22.) The RWQCB told TCA that as currently proposed, "the project does not meet Water Quality Standards and therefore, would not warrant certification." Id.

TCA App. 8-20(B), at 134 (p. 141/475). TCA provided no further support for its assertion.

11. The Commission objected to the toll road in part on the basis of lack of information on water quality. TCA App. 1-2, at 26 (p. 26/286). TCA has not argued that the Commission's objection on this basis was flawed.

c. The Toll Road Would Not Provide Significant Air Quality Benefits.

TCA next contends that its toll road is “an important component of the strategy” to comply with the requirements of the Clean Air Act. TCA claims that the Commission’s objection to the toll road “jeopardizes” the ability of Southern California to comply with those requirements. TCA Br., at 24-25. This claim is simply wrong.

In the SEIR for the project, TCA wrote that various alternatives would not have any measurable change in pollutant concentrations for the South Coast Air Basin. TCA also stated that none of the alternatives would result in an adverse regional impact because none of them increases air emissions by more than 0.1%. TCA App. 20_21-49, at 4.7.35 (p. 627/674).

In its Statement of Overriding Considerations, TCA identified several significant air quality impacts that could not be mitigated to a level of insignificance. TCA found that regional air quality emissions would decrease from existing conditions with or without the toll road. However, TCA also found that there would be a long-term significant adverse impact for NO_x emissions. And TCA found that the project would result in short-term construction emissions that could not be mitigated to a level of insignificance. TCA App. 18-37, at 25, 28 (pp. 101, 104/328).^{12/}

TCA also claims that the project would have beneficial effects on GHG emissions. TCA Br., at 29-30. However, the Commission objected to the project in part because of a lack of information on this topic. TCA App. 1-2, at 26 (p. 26/286). The Commission noted that it could not reproduce TCA’s GHG emission numbers using the references TCA provided, citing the emissions from the use of asphaltic

12. Relying on a March 2, 2008 letter from the Southern California Association of Governments to a member of the city council of La Forest, California, TCA claims that the Commission’s objection jeopardizes Southern California’s compliance with the Clean Air Act because TCA’s preferred alternative is a “Transportation Control Measure” or TCM for the South Coast Air Basin. TCA Br., at 24, 25. However, in its SEIR, TCA noted that the “non-toll road/corridor Alternatives would not interfere with most of the TCMs” but that if one of those alternatives was selected, “substitute measures would have to be implemented. . . .” TCA App. 21-49, at 4.7.37 (p. 629/674). Thus, the SEIR suggests that non-toll road alternatives do not pose the difficulty that TCA now claims.

concrete as a specific example. Nor did TCA specify how it arrived at tailpipe emissions for construction activities or how it calculated the CO₂ rates. Finally, TCA did not document that the claimed operational benefits of the toll road were real. TCA App. 1-2, at 260-261 (pp. 260-261/286). TCA has not addressed the Commission's assertion that TCA failed to provide information about these alleged benefits.

Based on the information TCA did present, any potential reduction in GHG emissions is either negligible or non-existent. First, if TCA uses asphaltic concrete for construction, the Commission calculated nearly 800,000 tons of CO₂ from construction activities. TCA App. 1-2, at 260-261 (pp. 260-261/286). Moreover, the evidence before the Commission showed that the key to reducing GHG emissions is to reduce vehicle miles traveled and that adding highway capacity will increase vehicle miles traveled. *Id.* at 261 (p. 261/286).

Second, TCA claims the project would result in a reduction in GHG emissions of 200 million pounds (or 100,000 tons) per year of CO₂. TCA Br., at 29. At this rate, the toll road would have to operate for at least 8 years to offset the construction emissions. Moreover, TCA admitted that on a regional level, a reduction of 100,000 tons reflects a net reduction of only 0.137% compared with baseline conditions. TCA App. 1-2, at 256 (p. 256/286). At a national level, the Energy Information Administration indicates that CO₂ emissions were about 5890 million metric tons from energy sources. (CCC App., at 68.) The reductions TCA estimates from its project are no more than .00000017% of that total. While the Commission recognizes that any actual reductions in GHG emissions can be beneficial, the amounts TCA estimates from this project, even if correct, would not contribute substantially enough to the national interest to warrant an override.

d. The Improvements At Camp Pendleton Do Not Substantially Further The National Interest In Orderly Processes For Siting Major Facilities Related to National Defense.

TCA's final argument with regard to Element 1 is that it would provide "important national security improvements at Camp Pendleton." TCA Br., at 25. TCA proposes two improvements at Camp

Pendleton: redesign and reconstruction of the San Onofre Gate to the base and enhanced access to Green Beach.^{13/}

Section 303 of the CZMA does state that state coastal zone programs should, inter alia, give priority to orderly siting of *major facilities* relating to the national defense. 16 U.S.C. § 1452(2)(D). Relocating and reconstructing the San Onofre Gate and providing enhanced access to and from Green Beach (two underpasses) do not involve the siting of major facilities relating to the national defense. Rather, these are minor construction projects at an already existing military base.

Nor does TCA establish that these minor projects would substantially further the national interest. The redesign and reconstruction of the San Onofre Gate would be an improvement to the base but a small one.^{14/} The environmental documents indicate that the reconfigured gate would enhance Camp Pendleton's security. However, those documents also indicate that construction of TCA's preferred alternative would have an adverse impact on base security. TCA App. 15-31(H), at 2.16-10 (p. 270/441). Thus, the reconfigured gate simply offsets that adverse impact of the project. This cannot be construed as substantially furthering the national interest.

Similarly, the improved access for Green Beach is not significant. The SEIR states that the majority of amphibious training occurs at Red Beach which is outside the toll road study area. In contrast, the Marine Corps uses Green Beach for training only five to ten times per year (out of a total of 40,000

13. In the section of its brief addressing Element 1, TCA's caption to this argument refers to important infrastructure and training improvements at Camp Pendleton. TCA Br., p. 25. It then refers to Section II.B.2 of its brief. *Id.* That section discusses the projects at the base as well as TCA's claim that the toll road would provide a "vital" alternative route for deploying of troops from the base. *Id.* at 28. Because the claim of an alternative route for deployment is not the siting of a major national defense facility, the Commission discusses this matter in the section of this brief addressing Ground II.

14. Citing to the Virginia Electric Power decision, TCA suggests that any benefit to a military facility, no matter how small, is important to the national interest. TCA Br., pp. 26-27. Virginia Electric Power involved a far larger benefit: the project there would have provided water to a major metropolitan area with many military facilities. Providing water to numerous military facilities is a matter of far larger scale than reconstructing an access gate and enhancing access from a beach.

training events on the base each year). TCA App. 15-31(H), at 2.16-3 (p. 263/441); 22_23-51, at 4.21-10 (p. 230/514). TCA has not claimed and has not established that the improved access for Green Beach substantially furthers the national interest.

The regulations, and NOAA's interpretive guidance, articulate the burden that TCA must meet in order to satisfy Element 1 of Ground I. TCA has not met its burden. TCA's toll road project is not coastal dependent. Nor does the toll road further the national interest as articulated in the CZMA in any substantial way. Rather, the toll road is a local project without national implications that does not benefit the national interest. Because TCA has failed to meet its burden on Element 1, the Secretary should deny this appeal.

B. Element 2: The Toll Road's Adverse Coastal Effects Far Outweigh Any Alleged Contribution To The National Interest.

As demonstrated above, the toll road contributes little to the national interest. Yet, its effects on coastal resource would be substantial, adverse, and unmitigated. These adverse effects far outweigh the road's contribution to the national interest and thus TCA fails to meet Element 2 of Ground I required for an override. 15 C.F.R. § 930.121(b).

1. The Toll Road Would Adversely Affect Environmentally Sensitive Habitat Areas And Endangered Species.

The Commission found the toll road would adversely affect environmentally sensitive habitat areas (ESHA) and endangered species. The Coastal Act defines ESHA as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." Cal. Pub. Res. Code § 30107.5. One of the enforceable policies of the CCMP provides that ESHA "shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." Cal. Pub. Res. Code § 30240(a). The section further provides that development in areas adjacent to ESHA and parks and recreation areas "shall be sited and

designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat and recreation areas.” Cal. Pub. Res. Code § 30240(b). As Dr. Michael White, Ecologist with the Conservation Biology Institute, testified at the Commission’s hearing regarding the San Mateo Watershed where the toll road is proposed:

As a testament to its quality, this area supports at least 11 threatened or endangered species, thus the project area clearly qualifies as . . . ESHA. In fact, given the high quality and the diversity of its resources and the dramatic loss of resources elsewhere in coastal Southern California, it can legitimately be considered a super ESHA.

TCA App. 3-7, at 135 (p. 143/210). In coming to the conclusion that the toll road would impact ESHA, the Commission relied on a wide range of scientific reports, scholarly journal articles, studies and research conducted by several hundred biologists and noted experts, as demonstrated by the 11 pages with 130 separate citations included in the staff report’s substantive file documents. TCA App. 1-2, at 273-286 (pp. 273-286/286). The Commission’s decision and the evidence in the appendices support rejection of TCA’s appeal.

With regard to the arroyo toad and gnatcatcher, TCA mischaracterizes the preliminary “no jeopardy” letter by FWS. FWS stated that the impacts to those species were not fully offset and further consultation will take place. TCA App. 72/73-102, at 2 (p. 2/3). FWS prepared the preliminary letter before TCA certified the SEIR and before TCA chose the preferred alternative, therefore FWS had not fully evaluated the toll road’s impacts when it wrote the letter. TCA App. 1-2, at 50 (p. 50/286). FWS has yet to release a final Biological Opinion with regard to the toll road. TCA App. 1-2, at 43 (p. 43/286). TCA’s reliance on the preliminary “no jeopardy” letter is misplaced.

a. Tidewater Goby

The Commission found approximately 24 acres of tidewater goby habitat would be affected by the project. TCA App. 1-2, at 41 (p. 41/286). The Commission based this finding on the SEIR which identified 19.74 acres in San Mateo Creek and 9.56 acres in San Onofre Creek that would experience

long-term construction related impacts and cause additional mortality to the gobies. Id. The Commission also considered the habitat disturbance caused during bridge construction. Id.

TCA relies on the FWS letter; however, that opinion is only preliminary and, as explained above, is not the agency's final Biological Opinion. FWS previously expressed serious concerns about the impacts of an earlier iteration of the toll road on the goby. TCA App. 1-2, at 41 (p. 41/286). Moreover, in concluding that the project would have adverse, unmitigated impacts on the tidewater goby, the Commission relied on "finalized, peer reviewed and publicly vetted studies, research reports and articles that have been made available as a result of the diligent work of biologists funded through academic institutions, research organizations, USFWS, USGS, CDFG, NOAA/NMRS and U.S. Marine Corps Base Camp Pendleton." Id. In addition to the Commission's decision and its expert staff analysis, the evidence in the appendices demonstrates that the toll road would adversely affect the tidewater goby. See TCA App. 2-6E, at 15-16 (pp. 16-17/55).

b. Pacific Pocket Mouse

The Commission found the toll road would adversely affect the Pacific Pocket Mouse (PPM) and that the proposed mitigation was insufficient. TCA App. 1-2, at 34-37 (pp. 34-37/286). The PPM is a critically endangered species found only within 2.5 miles of the coast. TCA App. 1-2, at 34 (p. 34/286). It was listed in 1994 on an emergency basis following discovery of a single population on Dana Point Headlands; prior to that, it was believed extinct. Id. Two additional populations were discovered on Camp Pendleton in 1995. TCA App. 1-2, at 35, (p. 35/286). One of the known populations occurs within and adjacent to the project area. Id.

The Commission considered TCA's evidence, the preliminary FWS letter, the 1998 FWS Recovery Plan for the PPM, a letter from Dr. Wayne Spencer, a recognized PPM expert (TCA App. 1-4C (pp. 10-22/34)), as well as the opinion of the staff biologist (TCA App. 1-3M, at 1-18 (p. 4/18)). Regarding TCA's proposed mitigation, Dr. Spencer opined that

[T]he use of culverts as road crossing structures is *completely untested for this species*. Installing culverts would be an experimental treatment with uncertain results, which invalidates this as a 'mitigation measure.' That said, if this project were to go forward despite its severe adverse effects, I agree that carefully designed culverts should be installed in hopes that they will work; but the statements by TCA and Ramey that the culverts will actually improve connectivity for PPM over the current condition are scientifically unjustified.

TCA App. 1-4C, at 8 (p. 17/34). Based on the evidence, the Commission found that the toll road would adversely affect the PPM, temporarily or permanently degrade approximately 12 acres of PPM essential habitat/ESHA and likely contribute to the local extirpation of the species. The Commission concluded the toll road is inconsistent with section 30240 of the Coastal Act based on these impacts. Cal. Pub. Res. Code § 30240; TCA App. 1-2, at 37 (p. 37/286). The evidence demonstrates the toll road would adversely effect the PPM. TCA App. 1-3M (pp. 4-13/18), 1-4C (pp. 10-20/34), 2-5A (pp. 1-9/61), 2-5D (pp.38-40/61), 2-6E (pp. 13-14/55)

c. Arroyo Toad

The Commission found the toll road would adversely affect the arroyo toad. See TCA App. 1-4H (pp. 1-6/34), 2-5D, at 6-7 (pp. 37-38/61); 2-6E, at 14-15 (pp. 15-16/55). The Commission considered evidence provided by TCA, the FWS preliminary letter, and the opinion of recognized arroyo toad expert Robert Lovich who has personal experience studying the area as a wildlife biologist on Camp Pendleton (TCA App. 4H, at 1-16 (pp. 1-16/19)). Lovich opined that the project would significantly disrupt arroyo toad populations in the coastal zone of the San Mateo Creek watershed and over the long term would impact populations in neighboring watersheds and tributaries as well. TCA App. 1-4H, at 1 (p. 5/19). He opined that the proposed mitigation measures are insufficient because the arroyo toad habitat would be destroyed if the road is constructed as proposed. Id. at 4 (p. 7/19). The Commission found the toll road would adversely affect the arroyo toad, a federally listed endangered species, and the proposed mitigation was insufficiently developed. TCA App. 1-2, at 51-67 (p. 51-67/286). The Commission

concluded that the project is inconsistent with section 30240 of the Coastal Act because it would use nearly 50 acres of ESHA, is not a resource dependent use and does not protect the arroyo toad from significant disruption of its habitat. TCA App. 1-2, at 66-67 (pp. 66-67/286).

d. Coastal California Gnatcatcher

Recognizing that its project would adversely affect gnatcatchers and their habitat, TCA proposed several mitigation measures including an onsite biologist to minimize the potential for wounding or killing the birds, setting aside habitat outside the coastal zone and restoring habitat within Crystal Cove State Park (a separate park unit). The Commission found these measures insufficient. While the onsite biologist would reduce the likelihood of mortalities, there was no guarantee that construction activities would not occur within gnatcatcher occupied areas during the breeding season, setting aside habitat outside the coastal zone does not provide adequate compensation for loss inside the coastal zone, and the restoration at Crystal Cove State Park was already occurring and will be restored regardless of TCA. TCA App. 1-2, at 67-79 (pp. 67-79/286). The Commission concluded that the project was inconsistent with the Coastal Act with regard to the gnatcatcher as well. TCA App. 1-2, at 79 (p. 79/286). The toll road would adversely affect the gnatcatcher. See TCA App. 1-4D (pp. 23-30/34); 2-5D, at 4-6 (pp. 35-37/61); 2-6E, at 11-12 (pp. 12-13/55), 26-30 (pp. 27-31/55).

e. Southern California Coast Steelhead

The Commission also found the project inconsistent with the Coastal Act ESHA protections because of the project's impacts on the steelhead. TCA App. 1-2, at 89-97 (pp. 89-97/286). The Commission reviewed the available information, including the preliminary letter from FWS, and concluded that the mitigation measures proposed by TCA were insufficient. The Commission found the project is not consistent with the Coastal Act because it is not resource dependent and presents a variety

of threats to an important population of steelhead. TCA App. 1-2, at 97 (p. 97/286).^{15/} The toll road would adversely affect steelhead. TCA App. 2-6E, at 15-16 (pp. 16-17/55).

2. The Toll Road Would Adversely Affect Wetlands.

The Coastal Act strictly limits development in wetlands. Section 30233 provides that the filling of wetlands may be permitted only where there are no feasible less environmentally damaging alternatives and where feasible mitigation measures have been provided to minimize adverse environmental effects. Section 30233 limits allowable uses in wetlands to specified enumerated uses. The toll road is not one of them. Cal. Pub. Res. Code § 30233. Section 30233(a)(4) allows incidental public service purposes, but the Commission interprets this as allowing the expansion of existing roadways and bridges only if the expansion is limited and the expansion is necessary to maintain existing traffic capacity. TCA App. 1-2, at 110 (p. 110/286). The California Court of Appeal upheld this interpretation in Bolsa Chica Land Trust v. Superior Court, 71 Cal.App.4th 493, 517 (1999) where the Court held that “roadway expansions are permitted only when no other alternative exists and the expansion is necessary to maintain existing traffic capacity.” Here, the Commission found the toll road is not a temporary disruption, is not a limited expansion of an existing roadway, would increase highway capacity and therefore is not an allowable use under the Coastal Act. TCA App. 1-2, at 110 (p. 110/286). The Commission found that there are less damaging feasible alternatives. TCA App. 1-2, at 127 (p. 127/286). And the Commission found TCA did not provide sufficient information about the proposed mitigation to enable the Commission to analyze the project for consistency with section 30233(a). TCA App. 1-2, at 130 (p. 130/286).

The toll road would adversely affect wetlands and is inconsistent with the wetlands protection

15. The Commission also found the project inconsistent with the Coastal Act because of its impacts on the least bell's vireo and San Diego fairy shrimp, also endangered species. TCA App. 1-2, at 79-89 and 97-101 (p. 79-89 and 97-101/286). TCA does not argue that these findings were improper. Thus, TCA has waived any objection to the Commission's findings with respect to these coastal resources and the project's inconsistency with section 30240 of the Coastal Act. Cal. Pub. Res. Code § 30240.

policy of the Coastal Act. Cal. Pub. Res. Code § 30233. See TCA App. 1-4A (p. 1-6/34); 2-5D, at 11-13 (pp. 42-44/61); 2-6E, at 26-30 (pp.27-31/55).

3. The Toll Road Would Adversely Affect Public Access And Recreation.

Starting with its General Plan amendment in 1984 and continuing with its 1997 Mitigation Assessment and correspondence in 2006, State Parks has consistently stated that if the toll road is carried out as planned, it “would have a major impact” on the Park. TCA App. 76-132, at 57 (p. 62/106); 27-55, at 5-8 (pp. 123-126/2281); (CCC App., at 15-16.) Based on her experience in operating and managing parks, the Director of State Parks believes the result of the toll road’s impacts would be the eventual loss of San Mateo campground. Id. at 10. These adverse impacts on the Park and the loss of San Mateo campground constitute adverse effects on public access and recreation.

TCA would permanently acquire 36.3 acres of the Park in the coastal zone and temporarily occupy an additional 100 acres of the Park during the construction period. TCA App. 1-2, at 141 (p. 141/286). These lands include 2400 feet of the Panhe Trail that provides access to the beach, 1600 feet of Upper Trestles Trail that connects Trestles Beach day use parking to the beach, and 1 mile of the California Coastal Trail along old Highway 101. TCA App. 1-2, at 149 (p. 149/286). While TCA has offered \$100 million as mitigation for recreational impacts, the Commission found that this would not mitigate for the project’s irreparable impacts. TCA App. 1-2, at 148 (p. 148/286). The Commission found the temporary and permanent loss of beach access and recreational trails conflicts with the enforceable recreation and access policies of the Coastal Act (Cal. Pub. Res. Code §§ 30210-30214, 30220, 30240(b)). TCA App. 1-2, at 154 (p. 154/286).

The Commission rejected TCA’s assertion that the toll road’s provision of access to the coast for inland visitors outweighs its impacts on existing access and recreation. First, the project is not an allowable use on or adjacent to park and recreation lands due to its impacts. Cal. Pub. Res. Code § 30240. Second, the Commission could not use the conflict resolution and balancing provision of the

Coastal Act (Cal. Pub. Res. Code § 30007.5) to find the project consistent with the Act. TCA's App. 1-2, at 270 (p. 270/286). The Commission found that TCA had not quantified its stated benefit of bringing visitors to the coast or demonstrated that significant numbers of recreational travelers as opposed to commuters would be willing to pay toll roads to reduce travel times, observing that weekend use of existing toll roads remains low. Id. Indeed, the primary purpose of the road is to relieve traffic congestion for commuters and TCA has stated that the tolls are set to ensure that traffic continues to be free flowing; if tolls were lowered and increased numbers of cars used the roads, the people who choose the roads would not get what they pay for - a congestion free drive that saves time. (CCC App., at 53.) As the Commission's former chief counsel explained, the alleged public access benefits of the toll road do not justify use of the balancing and conflict resolution section to find the toll road consistent with the CCMP. (CCC App. at 54-67.) Thus, the toll road has unmitigated and unacceptable adverse effects on public access and recreation. See TCA App. 1-3AA (p. 40/40); 1-4B (pp. 7-9/34); 2-5D, at 15-16 (pp. 46-47/61); 2-6E, at 17-23 (pp. 18-24/55).

4. The Toll Road Would Adversely Affect Surfing, Public Views And Water Quality.

Because of the project's impacts on surfing, the Commission found the toll road inconsistent with CCMP policies regarding protection of coastal areas suited for water-oriented recreation and low cost visitor serving recreation as well as water quality. Cal. Pub. Res. Code §§ 30213, 30220, 30230 and 30231; TCA App. 1-2, at 181-206 (pp. 181-206/286). TCA disdains the Commission's precautionary approach to protection of wave quality. TCA Br., at 39. Given the value of the resources, the Commission's approach was proper.

The Park includes Trestles Beach, the only surfing World Championship Tour stop in the continental United States; Trestles was so chosen because of the unique conditions that exist in the undeveloped San Mateo Creek watershed that provide the natural processes of erosion and sediment flows through the creek to the ocean. TCA App. 2-6A (pp. 31-32/107). As one expert observed, it is no

coincidence that one of the world's best surfing resources exists at the mouth of one of the last undeveloped watersheds in Southern California. TCA App. 1-4F, at 2 (p. 7/21). Trestles surf break is dependent on fan shaped, near shore sediment/cobble deposits at the mouth of San Mateo Creek. Id. A change in the delivery of coarse cobble material or ratio of fine-grained sediment to cobble can result in a significant impact to Trestles. Id. The toll road's 41 million yards of cut and fill, 530 acres of wide exposed cut and fill slopes and 136 acres of impervious surface could easily cause potentially significant impacts. Id. The impacts on water quality and the effects on Trestles are currently not fully known. Indeed, the RWQCB has advised TCA that its application for a water quality certificate remains denied because TCA failed to submit information requested in January 2007; the RWQCB noted a number of inconsistencies between the SEIR and TCA's proposed plans. (CCC App., at 22-32.) Any water quality benefits from the project are simply speculative at this point. The toll road would have adverse effects on surfing and public views; its full impacts on water quality are as yet unknown. See TCA App. 1-3U (pp. 1-3/40); 1-4E (pp. 1-3/21); 1-4F (pp. 6-12/21), 2-5D, p. 14-15 (pp. 45-46/61); 2-6E, p. 24-26 (pp. 25-27/55).

5. The Toll Road Would Adversely Affect Cultural And Archaeological Resources.

TCA admits that its project as proposed cannot avoid archaeological resources but asserts that its mitigation would reduce such impacts to the maximum extent feasible. TCA Br., at 40. The Commission found otherwise. TCA App. 1-2, at 220-248 (pp. 220-248/286). The toll road would affect Panhe, an ethnographic village of the Juaneno Band of Mission Indians listed with the National Register of Historic Places and still used by the Juaneno Band today. Id. The State Historic Preservation Officer (SHPO) has formally requested Panhe be reviewed as a Traditional Cultural Property in order to evaluate the proposed mitigation. Id. at 223-224 (p. 223-224/286); see also TCA App. 3-8, at 309-310 (p. 114-115/215), 393-396 (p. 197-200/215). The Native American Heritage Commission (NAHC) has sued TCA over the SEIR, alleging that the toll road would cause severe and irreparable damage to Panhe. Id. at 229 (p.

229/286). Despite the concerns of SHPO and NAHC, TCA advised the Commission that it would not undertake a Traditional Cultural Property evaluation. Such an analysis would evaluate how the resource was used historically and whether historic use continues today and would allow an evaluation of the road's effect on historical resources and possible what might be the means of mitigating such effects. Id. at 245 (p. 245/286).

TCA's brief states that its "avoidance measures are augmented by compliance with Section 106 of the National Historic Preservation Act of 1966, including the preparation of a Historic Property Treatment Plan with detailed mitigation requirements." TCA Br., at 40. TCA has not done the plan. TCA App. 8-20B, at 93 (p. 100/475). The Commission simply cannot evaluate a project's mitigation measures until it knows what they are; thus, the Commission could not determine whether TCA's future mitigation measures would be reasonable as required by the CCMP. Cal. Pub. Res. Code § 30244. The Commission properly concluded that it lacked sufficient information regarding TCA's mitigation measures and that the toll road in its proposed location is inconsistent with the archaeological protection policy of the CCMP. Id. at 248 (p. 248/286). See TCA App. 2-6E, at 33-34 (pp.34-35/55).^{16/}

6. The Road Would Adversely Affect Energy Consumption And GHG Emissions.

As the Commission explained in its decision, the CCMP protects numerous resources that would be adversely affected by the climate change that GHG emissions are causing, including public access, recreation, marine resources, wetlands, ESHA, agriculture, natural land forms and existing development. TCA App. 1-2, at 249 (p. 249/286). Other impacts to the coastal zone can result from sea level rise, ocean warming, and ocean acidification. Id. at 251-257 (pp. 251-257/286). The Commission considered TCA's arguments and the SEIR. The Commission considered the opinion of the project opponents'

16. The Commission also considered Trestles to be a cultural resource, based on evidence presented to it including testimony by SHPO. TCA App. 1-2, at 224-228 (pp. 224-228/286); 3-8, at 397-398 (pp. 201-202/215).

expert that the SEIR traffic analysis was faulty because the project had changed from a six lane road to a four lane road, the capacity was different, the project benefits were reduced, the modeling needed to be updated to reflect the new proposal and the air quality, GHG and energy analyses in the SEIR needed to be redone. TCA App. 2-5D, Ex. 4 (pp. 59-61). The Commission considered additional studies which concluded that attempting to resolve traffic congestion through building of more highways is counterproductive to reducing greenhouse emissions and that expanding road capacity increases auto travel and emissions. TCA App. 1-2, at 259 (p. 259/286). The Commission concluded that the toll road would likely increase GHG emissions, that TCA failed to fully analyze alternatives and that TCA failed to include full mitigation. *Id.* at 261 (p. 261/286). The Commission found the project inconsistent with the CCMP for this reason as well. The evidence in the record demonstrates that the toll road would adversely affect coastal resources due to GHG emissions. *See* TCA App. 1-2, at 249-261 (pp. 249-261/286); 2-5D, at 1-2 (pp. 59-60/61.)

7. The Adverse Effects Far Outweigh The Contribution To The National Interest.

The toll road's adverse effects on ESHA, wetlands, public access and recreation, surfing, public views, water quality, archaeology and GHG emissions are not mitigated to the maximum extent feasible. These impacts also are largely avoidable if a different configuration of the road is used as explained below in the Commission's discussion of alternatives. Given the paucity of any contribution to the national interest, the Secretary should decline to override the Commission's objection under Element 2 of Ground I.

C. Element 3: Reasonable Alternatives Exist.

The Secretary should sustain the Commission's objection because TCA cannot meet Element 3 of Ground I, which requires: "There is no reasonable alternative available which would permit the activity to be conducted in a manner consistent with the enforceable policies of the [CCMP]." 15 C.F.R. § 930.121. For purposes of Element 3, an alternative is evaluated with regard to the following criteria:

(1) consistency with the state's coastal management program; (2) specificity; (3) availability; and (4) reasonableness. Decision and Findings in the Consistency Appeal of Millennium Pipeline Co., L.P., Sec. of Commerce, December 12, 2003, at 23 (Millennium Pipeline).

The burden of proof initially lies with the state to determine whether an alternative may be conducted in a manner "consistent with the state's coastal management program" and to provide enough details to permit a further evaluation of the alternative's reasonableness and availability. Millennium Pipeline, at 23-24. The burden then shifts to the appellant to demonstrate that an alternative is unavailable or unreasonable. Id. at 23. "'Availability' refers to the ability of the appellant to implement an alternative that achieves the primary or essential purpose of the project. 'Reasonableness' refers to the conclusion that an alternative's advantages to the resources and uses of the state's coastal zone exceed the alternative's increased costs, if any." Id. at 24 (footnotes omitted). The appellant must provide direct cost information about an alternative in order to state with certainty the cost of such alternative; conclusory arguments are insufficient. Millennium Pipeline, at 29 & n.94, citing Decision and Findings in the Consistency Appeal of Chevron USA Inc., Sec. of Commerce, October 29, 1990, at 3 (Chevron).

The Commission identified six alternatives that "if carried forward to a complete level of design, could be designed in a manner to include impact avoidance (where feasible), minimization, mitigation and monitoring measures to a level consistent with" the CCMP. TCA App. 1-2, at 25 (p. 25/286). The six alternatives are: (1) the Arterial Improvements Plus-Refined (AIP-R) described in Smart Mobility's "An Alternative to the Proposed Foothill South Toll Road, The Refined AIP Alternative"; (2) the Central Corridor (CC); (3) the Central Corridor-Avenida La Pata (CC-ALPV); (4) Alignment 7 Corridor-Avenida La Pata (A7C-ALPV); (5) Arterial Improvements Only (AIO); and (6) the I-5 Widening Alternative (I-5).

TCA initially objects to the specificity of the Commission's alternatives discussion. TCA Brief, at 42-43. The AIP-R alternative is described in detail in the reports and responses prepared by Smart Mobility Inc. TCA App. 2-6F (pp. 1-115/115); 1-4M (pp. 1-9/9); 2-6E (pp. 1-55/55). The remaining

alternatives are from TCA's SEIR. Because the Commission is entitled to rely upon an SEIR (Cal. Pub. Res. Code § 21167.3), fault lies with TCA, not the Commission, to the extent these alternatives are not discussed with sufficient specificity (see TCA Br., at 42-43). The Commission agrees the discussion of the alternatives in the SEIR is inadequate and notes that judicial challenges to the document's adequacy are currently pending in the California trial courts, but the Commission nonetheless determined the alternatives could be conducted in a manner consistent with the CCMP. TCA App. 1-2, at 25 (p. 25/286).

TCA also contends that the Collaborative unanimously determined the Project to be the LEDPA, citing its own Response to the Commission's staff report. TCA Br., at 42. But TCA's own response specifically states that EPA and the Corps have only "preliminarily" determined the Project is the LEDPA and the FWS has only "preliminarily" determined that the preferred alternative would comply with the Endangered Species Act. TCA App. 8-20B, at 4 (p. 11/475). Moreover, EPA responded to the Smart Mobility Report by requesting the FHWA "to convene a meeting of the Collaborative to address how this new information will be incorporated into the Final Environmental Impact Statement (EIS)." (CCC App., at 20.) EPA stated that its concurrence on the preliminary LEDPA and comments on the draft EIS were completed *without consideration of this new information.* Id.

1. The AIP-R/Smart Mobility Alternative Is A Reasonable Alternative.

TCA briefly evaluated an Arterial Improvements Plus HOV Lane alternative (AIP) in the SEIR. TCA determined the AIP performed similarly to the toll road alternative with regard to enhanced mobility and reduced congestion and also had few impacts to riparian ecosystems, coastal sage scrub and gnatcatchers. TCA App. 20-48, at ES32 (p. 47/247).^{17/} But TCA rejected it from further consideration due to the costs of property acquisition and home/business displacement. Id. TCA found it would displace 898 residences. Id.

17. The only alternatives rejected for failing to meet the project purpose and need were the "No Action Alternatives." TCA App. 20-49, at 2-12 (p. 66/674).

Project opponents retained traffic experts to evaluate alternatives to the Project. Smart Mobility looked at alternatives to the project, specifically the AIP. TCA App. 3-7, at 143-144 (pp. 150-151/210). Smart Mobility concluded the AIP could be revised to address the displacement without affecting its effectiveness. TCA App. 2-6F, at xi (p. 2/115).

The Smart Mobility Alternative (AIP-R) has the same I-5 lane configuration as the AIP. TCA App. 2-6F, at 12 (p. 25/115).^{18/} TCA developed the AIP alternative in a 2003 study. TCA App. 2-6E, at 37 & n.178 (p. 38/55), citing Austin-Foust Associates, South Orange County Transportation Infrastructure Improvement Project Traffic and Circulation Technical Report, December 2003. Both the AIP and the AIP-R alternatives add an HOV lane in each direction between the El Toro interchange and the Orange/San Diego county line, beyond the HOV lanes already planned. In addition, auxiliary lanes are included in the AIP-R alternative in appropriate locations, consistent with the AIP. TCA App. 2-6F, at 12 (p. 25/115). The AIP-R revised several interchanges as well as several segments of I-5 in which changes to the cross sections of parallel frontage roads are proposed in order to accommodate the widening of I-5. Id. at 14 (p. 27/115).

In designing the AIP, TCA proposed complete reconstruction and reconfiguration of several interchanges, including at Ortega Highway and Avenida Pico, without consideration of ongoing local planning and design efforts for the interchanges. TCA App. 2-6F, at 14 (p. 27/115). TCA proposed partial cloverleaf interchanges which require a very large area and are not typically appropriate for urban areas. TCA's design effort produced a project footprint that "at best completely disregarded the issue of displacements, and appears more likely to have been geared toward maximizing them." TCA App. 2-6E,

18. TCA pointed out discrepancies between the AIP-R and AIP for the number of lanes on I-5 in Smart Mobility's original report. Smart Mobility revised the report to address the discrepancies. TCA App. 2-6F at 12 n.18 (p. 25/115).

at 38 (p. 39/55).^{19/} The Smart Mobility Report provides detailed comparisons of six interchanges, three arterial improvements, and two cross sections of I-5 from the AIP-R and the AIP to illustrate how the AIP-R minimizes impacts. TCA App. 2-6F, at 17-29 (pp. 30-42/115).

Smart Mobility determined:

- At the planning design level of review, the AIP-R is a practicable, prudent and feasible alternative to the proposed Foothill South Toll Road that warrants further development and analysis.
- The AIP-R results in limited displacement when carefully designed to avoid private property, consistent with good engineering practice for designing transportation in infrastructure in urbanized areas. This negates the primary reason for the rejection of the AIP alternative in the SEIR, impacts to private property.
- Based on the SEIR data, the AIP-R alternative would have similar results as the toll road in relieving I-5 congestion, regional travel time savings and other typical traffic performance measures.
- The design described in this report significantly reduces (about 95% based on preliminary estimates) the displacements identified in the SEIR without sacrificing performance.

TCA App. 2-6F, at 35 (p. 48/115). “But the biggest benefit of the AIP-R alternative . . . is that it provides all of the regional traffic benefits of the [Project] *without its devastating impacts on biological and recreational resources*. By improving an existing road in urbanized areas, the AIP-R completely avoids impacts to the Park, including the loss of San Mateo Campground, impacts to Trestles, and all of the impacts to habitat and water quality associated with the Toll Road’s route through the San Mateo Creek watershed. TCA’s own SEIR for the project concluded that the AIP alternative was environmentally superior to all the Toll Road alternatives, including the proposed project.” TCA App. 2-6E, at 37 & n.180 (p. 38/55), citing SEIR ES32 (TCA App. 20-48, at ES32 (p. 47/247)) and Table 2.6-1 (TCA App. 20-48,

19. “The right of way take along the mainline extends well beyond what is needed to construct new lanes. Interchange designs are selected with no regard to adjacent development, ignoring standard alternative designs commonly used throughout the country. Detention basins are placed on top of residential subdivisions.” TCA App. 2-6E, at 38 (p. 39/55).

at 2-161 (p. 216/147)).

Bergmann Associates conducted a peer review of the Smart Mobility Report. TCA App. 1-4K (pp. 2-9/54). Philip J. Clark, PE, former Deputy Chief Engineer and Director of Design for the New York State Department of Transportation, and Peter M. Melewski, PE, former Director of Design and Superintendent of Maintenance for the New York State Thruway Authority, conducted the Peer Review with assistance from Mark J. McAnany, PE, Manager of the Bergmann Transportation Group. TCA App. 1-4K, at 1 (p. 2/54). The Peer Review concluded:

Smart Mobility makes a strong case that improvements could be made by TCA to the AIP alternative that have great potential to greatly reduce the displacement of people and business while at the same time preserving its operational benefits. Their concepts for the various improvements are enhanced by the fact that they build off of traffic information, constraints, and opportunities already presented by TCA in the SEIR and related documents.

Smart Mobility's proposals reflect innovative concepts and context sensitive treatments that are endorsed and encouraged by the Federal Highway Administration (FHWA), the American Association of State Highway and Transportation Officials (AASHTO), the Institute of Transportation Engineers (ITE), and others. The proposals do so while at the same time addressing the overall objective for the project as stated in SEIR Section 1.5.2, Purpose of the Project, and concisely stated as "Improve the projected future LOS and reduce the amount of congestion and delay on the freeway system and, as a secondary objective the arterial network, in Southern Orange County."

The concepts presented in the AIP-R proposal warrant renewed development and refinement by TCA as a part of the on-going environmental review process. There is significant potential to reduce property acquisition impacts through improvements like those suggested in the report, as well as other innovations that could be developed by TCA.

...

TCA App. 1-4K, at 3 (p. 4/54). The Report offers the following conclusions: displacement of people and businesses for the AIP alternative can be markedly reduced; detailed studies are necessary to determine the extent to which displacements can be reduced; comparison between the AIP alternative and the toll road alternative is inconclusive until detailed studies are complete; the costs and impacts for the toll road

alternatives as presented in the SEIR are not representative of actual circumstances; and a refined AIP alternative should be presented in the SEIR. TCA App. 1-4K, at 7-8 (pp. 8-9/54).

Smart Mobility addressed the objections raised by Caltrans and TCA that the AIP-R was not designed to sufficient detail and would not meet Caltrans's design criteria. See TCA App. 10-22 (pp. 1-9/9); App. Br., at 44. Smart Mobility explained, "Our report was never intended to provide sufficient engineering information to gain Caltrans approval. Rather, our report is intended to provide information to policy makers and decision makers on the great potential for refinement of the AIP alternative to greatly reduce the property impacts, and that the decision to reject this alternative due to property impacts was based on flawed information or incomplete designs." TCA App. 1-4M, at 3 (p. 3/9); see TCA App. 3-7, at 148-149 (pp. 155-156/210).

Smart Mobility also addressed the safety concerns raised. Smart Mobility pointed out many instances when Caltrans has approved projects which fall short of engineering standards, an unavoidable necessity within the physical constraints of an urban environment. TCA App. 1-4M, at 2, 5 (p. 2 [referred to as "context sensitive" approach], 5/9); TCA App. 2-6F, at 39-40 (pp. 40-41/55).

While Caltrans has raised objections to the Smart Mobility report, EPA has determined it merits consideration and directed FHWA "to convene a meeting of the Collaborative to address how this new information will be incorporated into the Final Environmental Impact Statement (EIS)." EPA stated that its concurrence on the preliminary LEDPA and comments on the draft EIS were completed *without consideration of this new information*. (CCC App., at 20-21.)

TCA objects the AIP-R is unavailable due to its cost and the unavailability of funds. However, TCA assumed a cost of approximately \$1 billion based on its inflated displacement estimates. The Smart Mobility Study showed that the AIP-R can be done with minimal displacement and at a roughly comparable cost as the Project. TCA App. 2-6F, at iii (p. 4/115). The lack of current funding for the AIP-R is due to the fact that funding has not been sought. Moreover, as Project opponents pointed out,

the Orange County Transportation Authority is currently considering many of the elements of the AIP-R. TCA App. 2-6E, at 40 & n.186 (p. 41/55), citing Orange County Transportation Authority Stakeholders Working Group, *South Orange County Major Investment Study*, July 25, 2007, Alternative E – Alt C+HOT Lane Freeway Widening + High Transit (showing interchange upgrades and additional HOV lanes along I-5 in south OC).

As with the AIP alternative, the habitat impacts associated with the AIP-R alternative are located outside the coastal zone, involve lower quality habitat than would be affected by the toll road, and are far enough removed from the coastal zone that they would not affect coastal zone resources. TCA App. 32-57, p. 2, 6-7, 11-13, 32, 148, 173 (pp. 6, 10-12, 15-17, 36, 152, 177/812).

The evidence in the record establishes the AIP-R could be conducted in a manner consistent with the CCMP and is an available and reasonable alternative to the Project.

2. SEIR Alternatives Could Be Consistent.

The remaining alternatives also could be designed to conform to the CCMP. One difficulty facing the Commission with respect to the remaining alternatives is the level of detail in the SEIR.²⁰ The SEIR is inadequate with respect to its alternative analysis, and challenges on that basis are pending. TCA App. 1-3LL, at 1-2 (pp. 25-26/26). TCA attempts to blame the Commission for the lack of details (TCA Br., at p. 43), but fault lies with it. While the alternatives discussion in the SEIR is inadequate, the Commission nonetheless determined the CC-ALPV, A7C-ALPV, AIO, I-5, and CC alternatives could be conducted in a manner consistent with the CCMP.

20. As one traffic expert summarized it, “Given the complexity of the challenge before TCA, I would have expected TCA to evaluate alternatives in much greater detail before rejecting them; however, the plan for AIP alternative that TCA presented, which reduced congestion [] as well as the toll road, and which was subsequently discarded without further development and study, left me with a single overall reaction [] based up[on] more than 35 years of experience in highway design. If I had been director of TCA’s design group, and my staff had presented that alternative to me, I would have sent them back to the drawing board.” TCA App. 3-7 at p. 147 (p. 154/210).

a. Alternatives Outside Of The Coastal Zone

The CC-ALPV^{21/}, A7C-ALPV^{22/} and AIO^{23/} alternatives are located wholly outside of the coastal zone. A graphic of these alternatives in relation to the other alternatives is at Figure ES.1-2 of the SEIR. TCA App. 20-48, at ES183 (p. 198/247). Because they would be located outside of the coastal zone, they would not have any direct impacts on the coastal zone. TCA determined these alternatives would have no impacts in the coastal zone. TCA App. 22-50, at 4.15-4 (p. 380/483). As such, consistency review of these alternatives is not required and they could be conducted in a manner consistent with the CCMP. See TCA App. 1-2, at 25 (p. 25/286).

b. I-5 Widening Alternative (I-5)

The I-5 alternative adds one HOV lane in each direction and one or two mixed flow lanes in each direction on I-5 from south of Las Flores to south of Cristianitos Road and auxiliary lanes in some locations on this segment of I-5. The alignment of the I-5 alternative is shown in relation to the other alternatives on Figure ES.1-2 of the SEIR. TCA App. 20-48, at ES183 (p. 198/247). It is shown in relation to the coastal zone in Figure 4.15-6 of the SEIR. TCA App. 22-50, at 4.15-10, 11 (pp. 386-387/483). The SEIR concluded that the I-5 performed better than all of the alternatives (with the

21. The CC-ALPV alternative extends the existing SR-241 south from Oso Parkway to Avenida La Pata in San Clemente. It includes four mixed flow lanes initially and eight lanes (six mixed flow and two HOV) ultimately. It extends approximately 8.7 miles. TCA App. 20-48, at ES24 (p. 39/247).

22. The (A7C-ALPV) alternative extends the existing SR-241 south from Oso Parkway to the I-5 at the County line. It includes four mixed flow lanes initially and eight lanes (six mixed flow and two HOV) ultimately. It extends approximately 16 miles. TCA App. 20-48, at ES24 (p. 39/247).

23. The AIO alternative expands Antonio Parkway/Avenida La Pata between Oso Parkway and just south of Camino Las Ramblas with the addition of one lane in each direction beyond the Master Plan of Arterial Highways designations for this road segment. The improved segment between San Juan Creek Road and Avenida Pico has a total of six travel lanes and the improved segment from Oso Parkway to San Juan Creek Road has a total of eight travel lanes. Smart Street/Transportation Management Improvements would be constructed in the existing rights-of-way on Avenida Pico, Camino Las Ramblas, on Ortega Highway between Antonio/La Pata and I-5 and on Avenida La Pata between Avenida Pico and south of Camino Las Ramblas. TCA App. 20-48, at ES25 (p. 40/247).

exception of the no-action alternatives) with respect to impacts to riparian and ecosystem habitat. TCA App. 20-49, at 2-161 (p. 216/674). Because the I-5 alternative does not fill any wetlands or displace ESHA within the coastal zone, because its impacts are to relatively low quality habitat, and because those impacts would not affect coastal zone resources, this alternative could be conducted in a manner consistent with the CCMP. TCA App. 1-2, at 25 (p. 25/286).

c. Central Corridor (CC) Alternative

The CC alternative extends the existing SR-241 south from Oso Parkway to I-5 at Avenida Pico in San Clemente. It includes four mixed flow lanes initially and include eight lanes (six mixed flow and two HOV) ultimately. It extends approximately 12 miles. TCA App. 20-48, at ES24 (p. 39/247). The initial and ultimate configurations with respect to the coastal zone are shown at Figures 4.15-4 and 4.15-5 of the SEIR. TCA App. 22-50, at 4.15-8, 9 (pp. 384-385/483). A graphic of all of the alternatives in relation to each other is at Figure ES.1-2 of the SEIR. TCA App. 20-48, at ES183 (p. 198/247). Because the CC alternative would have minimal or no impacts on wetlands or ESHA within the coastal zone and its effects on habitat located outside the coastal zone would not affect resources of the coastal zone, it could be conducted in a manner consistent with the CCMP. TCA App. 1-2, at 25 (p. 25/286).

TCA's alternatives analysis gives higher priority to avoiding community disruption and economic costs than to the exceptionally limited and valuable sensitive habitat, recreation and archaeological resources. Such weighing directly conflicts with the Coastal Act's resource protection priorities. TCA App. 1-2, at 5 (p. 5/286). The Commission determined:

As evidenced by the large number of threatened or endangered species and federally designated critical habitats within the relatively small portion of the project area that is proposed to occupy the coastal zone, and the fact that well over one-third of the 138 acre project footprint within the coastal zone has been found to meet the Coastal Act definition of ESHA, it would be difficult to imagine a *more* environmentally damaging alternative location for the proposed toll road and one which be more clearly inconsistent with the environmentally sensitive habitat resource protection requirements contained within Coastal Act Section 30240.

TCA App. 1-2, at 3 (3/286). Because of the Project's impacts and the existence of alternatives that are consistent, specific, available and reasonable, the Commission's objection must be sustained.

IV.

THE TOLL ROAD DOES NOT MEET THE CRITERIA FOR A NATIONAL SECURITY OVERRIDE

The Secretary may override a state consistency objection if the Secretary finds that the activity is "necessary in the interest of national security." The Secretary must find that "a national defense or other national security interest would be significantly impaired were the activity not permitted to go forward as proposed." 15 C.F.R. § 930.122. This standard is "very stringent and very difficult to meet." Chevron, at 70. Moreover, generalized statements that a project is important to the national interest are insufficient to satisfy the requirements of Ground II. Rather the record must establish a "specific and significant impairment of a national security interest." Millennium Pipeline, at 39. The Secretary has never overridden a consistency objection based on Ground II.

Notwithstanding its claims to the contrary, TCA does not meet the standard for an override under Ground II. TCA has failed to demonstrate that in the absence of construction of its toll road in the configuration proposed, a specific national defense or national security interest would be substantially impaired. Because TCA bases its argument on benefits it would provide to the Marine Corps at Camp Pendleton, TCA is asserting, in effect, that the Marine Corps' ability to serve its national security functions at Camp Pendleton is now substantially impaired. TCA cites no evidence that would support this argument.

TCA bases its claim on three items relating to Camp Pendleton: redesign and reconstruction of the San Onofre Gate to the Base; enhanced access to Green Beach; and the claim that the toll road would

provide the Marine Corps an alternative access route to March Air Force Base in Riverside County. TCA Br., at 26-28.^{24/}

As to the redesign and reconstruction of the San Onofre Gate, TCA claims that the current gate experiences delays in inspections that “often cause traffic backups that could be a serious safety concern.” TCA asserts that the redesigned gate would have “adequate sight lines and distances and adequate room to facilitate security inspections and protect against terrorist attacks.” TCA Br. at 27. The pages that TCA cites to support its claims do not contain any information about “traffic backups” that are a safety concern nor do they make any mention of “terrorist attacks.” There is no evidence that national security is now substantially impaired because this gate has not been redesigned and rebuilt.

TCA next asserts that it would provide enhanced access from Green Beach into the base’s northern training area. *Id.* at 27-28. As TCA described this action, it would widen “military access road under the southerly end span of the existing San Mateo Creek/I-5 Bridge, allowing improved Marine amphibious access between Green Beach and northern military training areas.” TCA App. 13-31B, at 8 (p. 11/104).^{25/} As with its discussion of the San Onofre Gate, TCA nowhere claims that any national security interest would be substantially impaired if this improved access to and from Green Beach is not constructed. Nor does TCA assert that the Marine Corps training ability presently is substantially impaired because this access does not exist.

TCA’s final assertion with regard to national security is that the toll road would provide “a vital” alternative route for the Marine Corps to move troops to March Air Force Base. TCA claims this

24. The Commission notes that the first two items are not really a part of the toll road. Rather, they are items that the Secretary of the Navy was supposed to fund using the monies TCA paid for the easement. Pub. Law 105-261, § 2851(c); 112 Stat. 2220 (CCC App., at 38.) Thus, it is dubious whether TCA can even claim that these items can be considered in the context of a consistency appeal.

25. TCA asserts that the improved access would “provid[e] realistic training conditions for the marines and sailors.” TCA Br., at 28. The documents to which TCA cites contain no discussion about the access providing “realistic training conditions.”

alternative route is “critical if other exit points on the base are blocked, restricted or impacted due to fire, terrorist attack, or national disasters.” TCA Br., at 28. TCA supports this assertion with a citation its appendix, but the page to which TCA cites contains no references to Camp Pendleton.^{26/} Although documents that TCA created do refer to the toll road improving the Marine Corps access to March Air Force Base, no evidence supports that claim. In effect, TCA is supporting its argument by citing itself. Thus, its claim is little more than speculation. As noted supra, the Marine Corps possesses evacuation plans. TCA does not claim that these plans are insufficient or that the Corps presently is not prepared to deploy its troops in an emergency situation.

The Secretary has established a stringent standard that an appellant must meet for an override under Ground II; TCA falls far short of that standard.

26. In its Statement of Overriding Considerations, TCA finds that some impacts to the base cannot be reduced to a level of insignificance. TCA App. 18-37, at 79-80 (pp. 155-156/328). TCA also found that construction of the toll road would “improve access of Marine Corps units to March Air Force Base by providing an alternative to the use of I-5 and Interstate 15.” Id. at 81 (p. 157/328). This comment does not support TCA’s assertions in its brief about “catastrophic loss” or a “tactically safer” route.

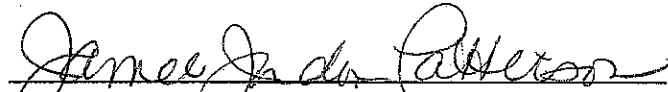
CONCLUSION

For the foregoing reasons, the Commission requests that the Secretary decline to override the Commission's objection to TCA's consistency certification.

Dated: April 11, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General for the State of California
JANET GAARD
Chief Assistant Attorney General
J. MATTHEW RODRIQUEZ
Senior Assistant Attorney General
JOHN A. SAURENMAN
Supervising Deputy Attorney General
HAYLEY PETERSON
Deputy Attorney General


JAMEE JORDAN PATTERSON
Supervising Deputy Attorney General

Counsel for Respondent State Agency
California Coastal Commission

ccc brief 2.wpd

DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: Foothill/Eastern Transportation Corridor Agency, et al., v. California Coastal Commission, et al.,

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266.

On April 11, 2008, I served the attached

**RESPONDENT CALIFORNIA COASTAL COMMISSION'S PRINCIPAL
BRIEF ON APPEAL UNDER THE FEDERAL COASTAL ZONE
MANAGEMENT ACT**

**RESPONDENT CALIFORNIA COASTAL COMMISSION'S
SUPPLEMENTAL APPENDIX (One Volume)**

(One Hard Copy and One CD of Brief and Appendix)

by placing a true copy thereof enclosed in a sealed envelope with the **FEDERAL EXPRESS**, addressed as follows:

Secretary of Commerce Carlos M. Gutierrez
Herbert C. Hoover Building
U.S. Department of Commerce
1401 Constitution Ave., NW
Washington, DC 20230

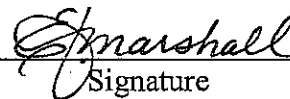
Thomas Street, Attorney-Advisor
NOAA Office of the General Counsel
1305 East-West Highway, Room 6111
Silver Spring, MD 20910

Robert D. Thornton
Nossaman Guthner Knox & Elliott
18101 Von Karman Avenue, Suite 1800
Irvine, CA 92612

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on April 11, 2008, at San Diego, California.

Elaine Marshall

Declarant



Signature